

Alexander, Joshua

From: Tony Davis <tdavis789@yahoo.com>
Sent: Thursday, April 14, 2022 3:03 PM
To: Alexander, Joshua
Subject: Fw: From Tony Davis on your April 6 letter to Hudbay, again

Josh,

Here is also an email that I just received this afternoon from the Army Corps. The last of Ms. O'Dell's three responses to my questions seems to strongly imply, although it doesn't directly say, that Hudbay needs a Clean Water Act permit to do construction involving discharging dredged and fill material on the west slop. FYI.

Tony Davis
Arizona Daily Star
520-349-0350 c

> From: "O'Dell, Dena M CIV USARMY CESPL (USA)" <Dena.M.O'Dell@usace.army.mil>
> Date: April 14, 2022 at 2:26:48 PM MST
> To: "Davis, Tony" <TDavis@tucson.com>
> Subject: RE: From Tony Davis on your April 6 letter to Hudbay, again

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> Good afternoon Tony: I hope you are doing well. Please see the responses to your question below:

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> 1) If the March 2021 AJDs for the Rosemont site remain valid, why can Hudbay not still rely on them as accurately delineating all jurisdictional waters within the individual review areas?

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> A.) In light of the U.S. District Court for the District of Arizona's Aug. 30, 2021, order vacating and remanding the NWPR in the case of Pascua Yaqui Tribe v. U.S. Environmental Protection Agency, the Corps halted implementation of the NWPR nationwide and is interpreting "waters of the United States" (WOTUS) consistent with the pre-2015 regulatory regime until further notice. Therefore, since the Corps has reverted to the pre-2015 regulatory regime, there is no certainty the March 2021 AJDs accurately delineate all jurisdictional waters under the current regulatory regime.

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> 2) If Hudbay can't still rely on the March 2021 AJDs, how can they still be valid?

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> A.) The AJDs are final agency actions and will not be unilaterally reopened pursuant to Regulatory Guidance Letter ("RGL") 05-02. Under this guidance, AJDs are valid for five years, "unless new information warrants revision of the determination before the expiration date." The Corps does not believe the NWPR vacatur, itself, satisfies the "new information" threshold.

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> 3) If Hudbay can't rely on the March 2021 AIDs as accurately delineating all jurisdictional waters in those areas, does that mean Hudbay can't clear and grade in those areas without having a valid Clean Water Act permit to clear and grade in them? If so, since the maps Hudbay submitted appear to show that it plans to build waste rock and trailings facilities on land that that were approved for clearing in it March 2019, Section 404 permit that has since been suspended, is it correct that Hudbay can't grade and clear in those areas until the March 2019-Section 404 permit has been reactivated?
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> A.) As a general principle, a non-jurisdictional determination made under the NWPR cannot be relied upon to support the discharge of dredged or fill material into aquatic resources considered to be waters of the U.S. under the pre-2015 regime. A permit would be required to discharge dredged or fill material.
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> Please don't hesitate to reach out to me if you have any additional questions.
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> Sincerely,
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> Dena M. O'Dell
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> Chief, Public Affairs
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> Los Angeles District, U.S. Army Corps of Engineers Dena.M.O'Dell@usace.army.mil
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> Office: 213-452-3925
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> Government Mobile: 213-509-4193
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> Twitter: twitter.com/LADistrictUSACE

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> Good afternoon Tony: When is your deadline?
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> Sincerely,
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> Dena M. O'Dell
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> Chief, Public Affairs
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> Los Angeles District, U.S. Army Corps of Engineers Dena.M.O'Dell@usace.army.mil
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> From: Davis, Tony <TDavis@tucson.com>
> Sent: Sunday, April 10, 2022 2:07 PM
> To: O'Dell, Dena M CIV USARMY CESPL (USA) <Dena.M.O'Dell@usace.army.mil>
> Subject: [Non-DoD Source] From Tony Davis on your April 6 letter to Hudbay, again

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> Dena,

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> I have a few more followup questions, on reviewing your April 6 letter a little more thoroughly. In it, I came across a couple of passages that seem potentially inconsistent, if not contradictory. They are:

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> 1)Page 1 of Col. Balten's letter says:

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> "As you know, on March 24, 2021, the U.S. Army Corps of Engineers' Los Angeles District provided two approved jurisdictional determinations ("AJDs") to Hudbay Minerals, Inc. ("Hudbay") under the Navigable Waters Protection Rule (NWPR). Pursuant to Regulatory Guidance Letter ("RGL") 05-02, the March 2021 AJDs are valid for five years, "unless new information warrants revision of the determination before the expiration date." The Corps does not believe the NWPR vacatur, itself, satisfies "new information" threshold as envisioned by RGL 05-02."

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> 2)In a passage spanning both pages of the letter, Col. Balten says:

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> "On January 6, 2022, Mr. Castanon called you to inform you of the

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> NWPR vacatur and advised that you cannot rely on the March 2021 NWPR AJDs as accurately delineating all jurisdictional waters under the current regulatory regime within each AJD's review area."

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> My questions are:
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> Thank you very much,
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> Tony Davis
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> Arizona Daily Star
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> 520-349-0350 c
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